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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALBERT E. TERRY et al., Plaintiffs and Appellants, v. JEFFREY H. MYERS, Defendant and Appellant.	B216925 consolidated with B220128 (Los Angeles County Super. Ct. No. BC308867)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Judith C. Chirlin, Judge. Affirmed.

Moorhead & Sparks and Jeffrey C. Sparks for Plaintiffs and Appellants.

Philip D. Dapeer for Defendant and Appellant.

This action involves victims of a real estate investment, which attracted investors by promising short-term returns of 15 percent based upon the promoters' claims that they had secured buyers for a commercial property and would repay the initial investment plus interest in 30 to 60 days when the property sold.[1] Defendant Jeffrey H. Myers and plaintiffs Albert (Mark) and Dolores Terry were investors. Myers invested first, and the promoters told him that he had to execute a $50,000 promissory note (note) in favor of the Terrys to permit them to become part of the investment group. Inexplicably, the note Myers signed did not mention the short-term return upon sale, but instead stated that Myers borrowed from the Terrys $50,000 at 15 percent interest, payable upon sale or in one year, whichever occurred first. When the real estate deal fell through, both Myers and the Terrys lost their investment. The Terrys, however, sought to enforce the note and sued Myers for breach of contract under various theories of liability, and also sued him for fraudulent concealment, claiming he had knowledge that the promoters were the perpetrators of a Ponzi scheme.

After a bench trial, the court concluded that Myers did not conceal any facts to the Terrys that induced them to make their investment, and the Terrys "failed to meet their burden of proof." Myers was awarded attorney fees under the terms of the note, but the trial court denied attorney fees as a sanction under Code of Civil Procedure section 2033.420, arising from the Terrys' denials in response to Myers' requests for admission. Myers appeals the attorney fees orders, and the Terrys appeal from the judgment, and the order awarding attorney fees.

Our analysis of the record and the trial court's resolution of the questions of law presented, together with its exercise of discretion, convince us that there is no basis to reverse the judgment. As for the attorney fees awarded, there was no legal error or abuse of discretion in the amount awarded, and that decision will remain in place.

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[1] This practice is known as "flipping," a term used in real estate to describe purchasing a revenue-generating asset and quickly reselling or flipping it for profit.

FACTS[2]

The Terrys decided to invest $50,000 in commercial property in Wichita, Kansas (Kansas Property) for a short-term return of 15 percent when the property sold in 30 to 60 days. To permit the Terrys to invest in the deal, the real estate promoter asked Myers to sign the note secured by an unrecorded mortgage on the Kansas Property. The note states: "for value received, the undersigned does promise to pay to Albert E. and Dolores E. Terry, the principal sum fifty thousand and no/100 ($50,000) dollars, with interest from July 25, 2002, until paid, at the rate of Fifteen (15) per cent [*sic*] per annum, payable in one lump sum with the principal amount on or before July 25, 2003." (Capitalization omitted.) The note is "secured by a Mortgage and an Assignment of Rent on a 12 story office building located at **110 N. MARKET STREET, WICHITA, KANSAS**." Myers also signed the unrecorded mortgage.

1. *Myers Invests in Kansas Property*

Myers and David Weule invested $150,000 in the Kansas Property, both contributing $75,000. Myers was approached by Tim Weule, David's son,[3] but thereafter Myers dealt with promoters Dennis Sylvester and Michelle Sanford.[4] Sylvester and

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[2] The parties to an appeal have a duty to assist this court by fairly stating the evidence with respect to the appropriate standard of review. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113-114, disapproved on another ground, *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41-42.) The Terrys have failed to summarize the facts in the light most favorable to the judgment. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) Their brief also presents argument as facts and recites facts not supported by the record. We disregard facts with no record citations. California Rules of Court, rule 8.204(a)(1)(C) requires citing to the volume and page number of the record where the matter appears. It is not our role to cull the record to find support for the parties' assertions. (See *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 544-545.)

[3] Because some of the parties share the same surname, when necessary we use first and last names for clarity.

[4] We note there are various spellings in the record, we adopt the most common usage.

Sanford told Myers that a company called Datamation owned the Kansas Property in partnership with Jeff Tiller, and Tiller had been successful in short-term investments to "flip" commercial property to earn profits. Tiller agreed to let Sylvester and Sanford conduct the sale of the Kansas Property, but as Myers understood the arrangement, Tiller wanted money from Sylvester and Sanford in exchange for the opportunity. Myers believed that $100,000 of their investment would be allocated to permit Sylvester and Sanford to conduct the sale, and the remaining $50,000 would pay expenses while they were getting the buyer in position. Myers was led to believe that Sylvester and Sanford had a buyer in place when he made the investment.

On June 24, 2002, without conducting any due diligence, Myers wired $100,000 to the firm of Creel, Sussman & Moore. Myers also signed an "escrow agreement." The agreement stated that Myers was the "buyer" and Datamation Corporation was the "seller" of the Kansas Property. Myers signed the escrow agreement, but he never intended to buy the Kansas Property. Rather, he was investing in the Kansas Property and believed his investment would be used to maintain the building until it was sold. Myers testified that he was not the owner of the Kansas Property.

2. *The Terrys Invest in the Kansas Property and Myers Signs the Note*

The Terrys were David Weule's friends and knew Myers. David Weule, not Myers, told the Terrys about the investment opportunity in the Kansas Property and invited the Terrys to meet Sylvester. Sylvester told the Terrys that they would be repaid their initial $50,000 plus 15 percent interest in 30 days after a quick sale of the property. Sylvester also told the Terrys that they could secure their risk with a mortgage and personal note from Myers. After meeting with Sylvester, the Terrys decided to invest $50,000. Myers was not at this meeting and did not discuss the investment with the Terrys.

The day after their initial meeting, the Terrys met Sylvester to sign documents. Myers was present, and Sylvester gave the documents to Myers to sign. Sylvester told Myers that he had to sign these documents so the Terrys could invest in the Kansas Property.

Sylvester gave the Terrys instructions to wire their $50,000 investment to Bank of America, Cook Services, Incorporated. The Terrys did not loan Myers $50,000. Myers never received the $50,000 as specified in the note, and Myers did not receive any money that the Terrys had invested in the Kansas Property.

3. *The Terrys Invest in Another Real Estate Investment Opportunity*

In early August 2002, about two weeks after investing in the Kansas Property, David Weule invited the Terrys to his home for a meeting with the promoters to discuss another real estate investment opportunity. Mark Terry attended the meeting. During the meeting, David Weule described how successful his investments were with the Sylvester/Sanford group and displayed a check written to him from Cook Services, Inc. for $26,657. Sylvester also showed the group a check written out to Myers for the same amount. Myers was present, but he did not say anything during the meeting.

Myers testified that he received a check from Sylvester in early August when Sylvester came to meet with potential investors. Myers was not expecting a check, but Sylvester explained that the check was the "recapitalization on the original $75,000 investment." Myers testified that he had not been informed that Sylvester and Sanford were attracting new investors to recapitalize his initial investment. Myers did not know about the scheme on the day Sylvester made the presentation to investors at David Weule's house, and he did not know that the check David Weule showed the investors was money taken from the Terrys' investment in the Kansas Property. About two months after the meeting, Sanford acknowledged in an e-mail to Myers that David Weule had taken an early profit from the Kansas Property.

Following the investor meeting, Sylvester met with the Terrys at their home to discuss the real estate investment opportunity. He promised the Terrys an 18 percent return on their investment. The Terrys decided to invest $250,000.

4. *Kansas Property Foreclosure*

In November 2002, Myers learned through a newspaper article that Datamation had defaulted on the loan used to purchase the Kansas Property, and the lender, Real Estate Equity Lending, intended to initiate foreclosure proceedings. Myers recorded his

interest in the Kansas Property to secure his investment. He also took efforts to stop the foreclosure, which included investing additional money in the Kansas Property.

The Terrys were contacted by Myers, but they did not want to invest further in the Kansas Property. Instead, they asked Myers to notarize the mortgage that Myers signed so that they could record it against the Kansas Property. They also took steps to enforce the note.

PROCEEDINGS

1. *Bench Trial, Written Closing Arguments*

The Terrys filed suit, alleging numerous causes of action against Myers. By the time of trial, they proceeded on causes of action to enforce the note and for fraudulent concealment. The Terrys' contract theory was that even though Myers did not actually receive their money, he either benefited from their investment as the owner of the Kansas Property, or he guaranteed their investment. As for fraud, the Terrys' alternative theories were that Myers was vicariously liable as an agent or co-conspirator with the promoters, or Myers had a duty to disclose the Ponzi scheme that Sylvester and Sanford were attracting additional investors to pay early profits before the Kansas Property sold.

After the conclusion of testimony, the court asked the parties to prepare closing argument briefs. Myers' counsel requested a statement of decision. He proposed a stipulation that the parties would dispense with a tentative decision and submit proposed statements of decision with their written closing arguments. Both parties filed closing argument briefs and proposed statements of decision. But, there was no stipulation on the record.

2. *Ruling on Submitted Matter*

On January 26, 2009, the trial court issued a nine page "Ruling on Submitted Matter" (ruling). The trial court recited the evidence presented at trial, setting forth the plaintiffs' testimony and Myers' testimony. Based on this testimony, the trial court stated: "As was clear from the testimony of all parties, the principal scoundrels in this scenario were Sandford and Silvester [*sic*]." The court concluded that the plaintiffs "did not prove that it is more likely than not that Myers' involvement made him part of a

conspiracy, that he profited from Sandford and Silvester's scheme or that Myers did anything affirmatively to induce them [the Terrys] to make their investment." Thus, the Terrys "failed to meet their burden of proof[.]"

The ruling concluded by stating that "[i]f any party requests a formal Statement of Decision, Defendant shall prepare one in accordance with Code of Civil Procedure § 632."

On February 5, 2009, the Terrys' counsel filed what he referred to as a "request for written findings of fact and conclusions of law pursuant to CCP § 632." (Capitalization omitted.) The Terrys asked the court to provide a written statement, and the submitted request listed 69 separate "facts" and "conclusions." For example, request 47 states: "Myers' decision not to read the Promissory Note before he signed it is not a defense to his obligation to honor the Promissory Note pursuant to its terms and conditions."

On March 20, 2009, the Terrys filed a motion to vacate the court's ruling on the grounds that it is "incorrect and the legal bases for the decision are erroneous as a matter of law[.]" In their motion, the Terrys attacked the ruling as insufficient because it did not address the enforceability of the note, and they took exception to the court's conclusion that they did not carry their burden of proof.

3. *Statement of Decision*

Although improperly labeled and not authorized by the relevant statute, the trial court treated the Terrys' request for written findings as a request for a statement of decision under Code of Civil Procedure section 632. Under the statute, the principal controverted issues must be specified in the request. (Code Civ. Proc., § 632.) The trial court concluded the Terrys' request failed to comply with the Code of Civil Procedure because it did not request a statement of decision on the principal issues in the case. Instead the court stated, "it merely recites portions of the evidence that Plaintiffs believe

support their theory of the case." Having concluded the request was defective, on March 18, 2009, the trial court adopted its ruling as a statement of decision.[5]

4. *Attorney Fees, Judgment*

Myers sought to recover attorney fees in the amount of $238,190 for cost-of-proof sanctions under Code of Civil Procedure section 2033.420 in connection with the Terrys' denial of requests for admissions later proved at trial.[6] The trial court denied the attorney fees request, stating at the hearing that there were reasonable grounds for the Terrys' denial: "You still have not convinced me that it was unreasonable for them to have done what they did, and I think that's one of the elements that I would have to find. So, I'm going to deny the motion."

Myers then sought to recover $388,190 under Civil Code section 1717 as the prevailing party on the note. The trial court determined that Myers was the prevailing party, but concluded the attorney fees requested were not reasonable given the breach of contract cause of action was one of seven causes of action the Terrys alleged against Myers. Thus, the trial court limited its attorney fees award to $41,117.

Judgment was entered. The Terrys appeal from the judgment and the award of attorney fees, and Myers appeals from both attorney fees orders. The appeals were consolidated.

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[5] On March 25, 2009, the Terrys filed an "objection/response" to the court's order, contending that Myers failed to file a proposed statement of decision. The court's ruling stated Myers' obligation arose if any party requested a statement of decision. Although Myers requested a statement of decision at the conclusion of trial and also submitted a proposed statement of decision with his closing argument brief, the court appeared to disregard this earlier request, and also concluded the Terrys' request did not comply with Code of Civil Procedure section 632.

[6] Code of Civil Procedure section 2033.420, subdivision (a) states: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees."

DISCUSSION

I.

The Terrys' Appeal

The Terrys contend the court's statement of decision violates the statute, but they do not seek reversal to allow the trial court to comply with Code of Civil Procedure section 632. Instead, they seek to take advantage of what they perceive as a procedural error and ask this court to conclude the note is an enforceable obligation and enter judgment in their favor. In the alternative, the Terrys contend the judgment is not supported by substantial evidence, and the exclusion of evidence for impeachment purposes was prejudicial error.[7] We discuss each contention in turn, holding there is no basis to reverse the judgment.

1. *The Statement of Decision is Sufficient to Disclose the Court's Determination of Controverted Issues at Trial*

The Terrys contend that the trial court committed reversible error because it denied their timely request for a statement of decision, and the court's ruling, which it adopted as a statement of decision, is defective. We reject these arguments.

Contrary to the Terrys' argument, the trial court did not conclude that their request was untimely filed. (Code Civ. Proc., § 632.) Rather, the court determined that the request was defective because it did not comply with the statute. The Terrys' request listed 69 items that appeared to require the court to make findings with regard to individual items of evidence. The statute and Rules of Court do not require this type of analysis in the statement of decision. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d); *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524, disapproved on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles*

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[7] The Terrys' notice of appeal also challenges the denial of their motion for summary adjudication. By failing to articulate any legal argument in their opening brief, they have abandoned that aspect of the appeal. (See *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.)

Cellular Telephone Co. (1999) 20 Cal.4th 163, 184-185.)[8] Thus, we find distinguishable the cases the Terrys cite for the proposition that when counsel makes a timely request for a statement of decision upon the trial of a question of fact by the court, the court's failure to prepare such a statement setting forth the factual and legal basis for its decision of the principal controverted issues is reversible error. (*Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 679-681; *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129-1130.) Moreover, in these cited cases, the failure simply required reversal to allow the trial court to set forth the factual and legal basis for its ruling. The Terrys, however, do not seek remand for an explanation of the court's decision, instead they contend the trial court's decision is wrong and ask this court to reverse the judgment because of this procedural error. We decline this request.

In any event, the trial court issued a statement of decision, which the Terrys contend violates Code of Civil Procedure section 632 because it omitted any explanation regarding the obligation on the note. The Terrys had 15 days after the proposed statement of decision and judgment was served, to serve and file objections.[9] (Code Civ. Proc., § 634; Cal. Rules of Court, rule 3.1590(g); *Fladeboe v. American Isuzu Motors*

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[8] The Terrys cite *People v. Casa Blanca Convalescent Homes, Inc., supra*, 159 Cal.App.3d 509, which does not help their cause. In that case, the trial court prepared a detailed statement of decision, which Casa Blanca contended was insufficient because their request for the legal/factual basis for the court's decision made 16 demands, each with several subparts that would have required the trial court to answer more than 75 questions and make a list of findings on evidentiary facts on issues not controverted by the pleadings. (*Id*. at pp. 524-525.) As the court noted, "Casa Blanca seeks an inquisition, a rehearing of the evidence. The trial court was not required to provide specific answers so long as the findings in the statement of decision fairly disclose the court's determination of all material issues. [Citation.]" (*Id*. at p. 525.) The same is true here, the trial court was not required to address all 69 points presented in the Terrys' request.

[9] The Terrys filed a motion to vacate the ruling. Although the Terrys contend that was sufficient to object as required under the California Rules of Court, rule 3.1590(g), we disagree. The motion to vacate also sought reversal because the trial court's decision was wrong. The objections contemplated following the announcement of the statement of decision serve a different purpose.

Inc. (2007) 150 Cal.App.4th 42, 59-60.) If omissions or ambiguities in the statement of decision's factual findings are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) But, if a party "does not bring such deficiencies to the trial court's attention, the party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*Id*. at pp. 1133-1134.)

We do not agree with the Terrys that the statement of decision is a "narrative" without any analysis or discussion on their claim to enforce the note. As is evident from our discussion of the facts, the trial court discussed the factual and legal basis for its decision on the controverted issues. There was conflicting evidence concerning the circumstances surrounding the execution of the note. Myers testified that he did not borrow or receive $50,000 from the Terrys, did not benefit from their investment because he was not the owner of the Kansas Property at the time the Terrys invested, and did not promise to guarantee the Terrys' investment. The Terrys admitted that their investment was not a loan to Myers. They invested in the Kansas Property and wired the money to Cook Services, Inc., not to Myers. The trial court concluded that both Myers and the Terrys were victims of the promoters and no money changed hands between Myers and the Terrys based upon the terms of the note, or the Terrys' investment in the Kansas Property. Our review does not and cannot involve a reweighing of that evidence or assessing the credibility of these witnesses. Under the unique circumstances presented in this case, we conclude there is no reversible procedural error.

2. *The Trial Court Did Not Erroneously Shift the Burden to the Terrys*

The Terrys contend that as a matter of law the note is an enforceable obligation because Meyers signed the note. They maintain the trial court's conclusion that they "failed to meet their burden of proof," was erroneous because Myers, not the Terrys, had to prove his affirmative defense, that is, the absence of consideration. As we discuss, the trial court relied on evidence showing that Myers rebutted the presumption of consideration.

a. *Standards of Review*

The Terrys seek de novo review. When an appellate court reviews a statement of decision issued after a bench trial, the trial court's findings of fact are reviewed under the substantial evidence standard, and the trial court's resolution of a question of law is subject to independent review. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935.) Thus, the trial court's findings of fact will be upheld if there is substantial evidence to support the finding. (*Ibid*.) In evaluating the support for a finding, we view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Ibid*.) On appeal, the Terrys bear the burden of demonstrating that the record does not contain sufficient evidence to sustain the challenged finding of fact. (*Boeken v. Philip Morris, Inc.*, *supra*, 127 Cal.App.4th at p. 1658.) While the Terrys contend that we cannot imply findings because of the defects in the statement of decision (see *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134), we need not do so because the Terrys have not met their burden on appeal.

b. *Presumption of Consideration was Overcome*

The Terrys contend they established the note was an enforceable obligation, and Myers had to prove lack of consideration as an affirmative defense. (Cal. U. Com. Code, § 3303, subd. (b).) A promissory note is a form of a negotiable instrument. (Cal. U. Com. Code, § 3104.) Negotiable instruments are subject to the defense of failure of consideration. (*Ibid*.)[10] California Uniform Commercial Code section 3303, subdivision (b) defines " '[c]onsideration' " as "any consideration sufficient to support a simple contract," and states the "drawer or maker of an instrument has a defense if the instrument is issued without consideration."

A promissory note is presumed to have been given for sufficient consideration, and the introduction of the note into evidence establishes a " ' "*prima facie* right to

[10] Because we are dealing with the original payee, the limitations on defenses available to a holder in due course are not at issue here. (See Cal. U. Com. Code, § 3305, subds. (a)(2), (b).)

recover according to its terms. . . .” ’ [Citation.]” (*Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1133.) This is a rebuttable presumption. The burden of overcoming the presumption that every negotiable instrument has been issued for valuable consideration is on the party claiming it was executed without consideration. (*Ibid.*) The same is true under contract law. (Civ. Code, § 1615; *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 880-884 [presumption of consideration under Civ. Code, § 1614 affects the burden of producing evidence and not the burden of proof].)

The presumption worked in the Terrys favor, and the burden shifted to Myers to show by extrinsic evidence that the note could not be enforced because there was a lack of consideration. (*Saks v. Charity Mission Baptist Church*, *supra*, 90 Cal.App.4th at p. 1133.) The burden of producing evidence “means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.” (Evid. Code, § 110.) If the burden is met, then the presumption disappears. The Terrys had the burden of proof to establish the note was enforceable. Thus, because the trial court concluded the Terrys did not meet their burden of proof, the trial court credited Myers’ evidence to rebut the presumption that the note was given for valuable consideration. Upon our review, we find sufficient evidence to support the trial court’s finding.

The Terrys next contend that there is substantial evidence of consideration. The Terrys, however, only cite evidence (without citation to the record) that supports their theory of the case. As noted, we must affirm the judgment if an examination of the entire record viewed in the light most favorable to the judgment discloses substantial evidence to support the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1222.) Substantial evidence was presented to rebut the presumption that Myers’ signature was sufficient consideration. Myers did not borrow $50,000 from the Terrys, did not act as a guarantor of their investment in the Kansas Property, and did not benefit from the Terrys’ investment in the Kansas Property. Although the Terrys argue the record contains evidence that the use of their investment went to pay the mortgage on the Kansas Property, the trial court sitting

as trier of fact accepted Myers' testimony that he was "duped" by the promoters and was not the owner of the Kansas Property at the time the Terrys made their investment. The trial court also concluded that the Terrys were not enticed to enter into the investment because Myers signed the note.[11] The trial court was in a better position to determine credibility. Thus, we conclude the Terrys have shown no error in the judgment. In light of our conclusion, we need not address the Terrys' related issues concerning the failure of Myers' affirmative defenses.

3. *The Trial Court Did Not Err in Concluding There Was No Fraudulent Concealment*

The Terrys contend the judgment must be reversed because the "undisputed evidence" establishes Myers intentionally or negligently concealed known facts at the investor meeting that the promoters were perpetrating a fraud by attracting investors to pay out early profits taken from the Kansas property. The evidence, however, supports the trial court's conclusion that there was no fraudulent concealment.

"There are ' "four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]" [Citation.]' [Citation.]" (*Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870-871, fn. omitted; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.)

The Terrys do not contend they had a fiduciary relationship with Myers. The other three circumstances in which nondisclosure is actionable require a relationship in

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[11] Without citation to the record, the Terrys' briefs make several assertions that Myers acted as the promoters' agent. The trial court rejected this theory, concluding that the Terrys did "not prove that . . . Myers' involvement made him part of a conspiracy, that he profited from Sandford and Silvester's scheme or that Myers did anything affirmatively to induce them to make their investment."

which a duty to disclose arises. (*LiMandri v. Judkins*, *supra*, 52 Cal.App.4th at pp. 336-337.) "As a matter of common sense, such a relationship can only come into being as a result of some sort of *transaction* between the parties." (*LiMandri v. Judkins*, *supra*, at p. 337.)

The trial court credited evidence that Myers did not have any involvement in promoting these real estate investments, and it concluded that Myers was not the promoters' agent. Even if Myers knew about the early profit taking on the Kansas Property when he went to the investor meeting, as a potential investor, he had no duty to disclose to other investors that David Weule's and Sylvester's representations were actually early profits taken out of the Kansas Property before it was sold. In essence, the Terrys' legal theory is that Myers had a duty to disclose that the promoters intended to commit an intentional tort. (See *LiMandri v. Judkins*, *supra*, 52 Cal.App.4th at p. 338; see also *Bank of America Corp. v. Superior Court*, *supra*, 198 Cal.App.4th at pp. 872-873.) "The general duty is not to warn of the intent to commit wrongful acts, but to refrain from committing them." (*LiMandri v. Judkins*, at p. 338.) There was no error.

4. *The Trial Court Did Not Commit Reversible Error in Excluding Impeachment Evidence on a Collateral Matter*

The Terrys contend that the trial court erred in excluding portions of Tim Weule's deposition that was offered to impeach his father and would have shown: (1) the investment group sold shares in buildings and withdrew the invested shares as early profits; (2) Tim and David Weule split a 10 percent commission from the Terrys' investment; and (3) David Weule and Myers purchased the Kansas property and at the time of purchase they knew that there was a mortgage on the property. A review of the relevant portions of the transcript shows the Terrys actually offered this testimony for the purpose of impeaching David Weule's testimony on the commissions earned. On appeal, the Terrys contend the objection sustained on hearsay grounds should have been overruled because the proffered deposition testimony was "former testimony," an exception to the hearsay rule.

Whether David Weule did or did not receive a commission on the Terrys' investment was not relevant to the substantive issues in the case against Myers. A court's exclusion of collateral facts offered for impeachment purposes is a proper exercise of discretion. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1029-1031.) If exclusion of evidence is proper on any ground, judgment will not be reversed. (*Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 405, fn. 7; *Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173.) We conclude the trial court properly exercised its discretion to exclude this evidence.

Even if the evidence regarding commissions were improperly excluded, the Terrys cannot show prejudice resulting in a "miscarriage of justice." (Cal. Const., art. VI, § 13; Evid. Code, § 354.) A miscarriage of justice occurs when the court determines, after reviewing the entire record that " ' " it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' [Citation.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) David Weule admitted during cross-examination that his son split his commissions with him. Additionally, from other sources, the trial court heard evidence from the parties on early profits and the ownership of the Kansas Property at the time Myers and David Weule made their investment. Having heard this testimony, we are not convinced that the trial court's ruling in Myers' favor would have been different had it heard Tim Weule's deposition testimony. There was no prejudicial error.

II.

Appeal from Attorney Fees Motions

At the conclusion of the trial, Myers calculated his attorney fees at $388,190. In his motion for attorney fees pursuant to Code of Civil Procedure section 2033.420, Myers discounted his fees $150,000 because the Terrys dismissed their cause of action for a RICO violation (18 U.S.C. §§ 1961-1968) before trial. In his motion as the prevailing party, Myers sought $388,190 in attorney fees. After reviewing the trial court's

determination to limit fees as the prevailing party to those incurred in defense of the contract claim, we find no abuse of discretion.

1. *The Trial Court Did Not Abuse its Discretion in Denying Attorney Fees Under Code of Civil Procedure Section 2033.420*

Myers contends that because he established at trial that (1) he was not vicariously liable for the promoters' fraud, (2) he did not fraudulently induce the Terrys to invest, and (3) the note was not an enforceable obligation, he is entitled to recover cost-of-proof attorney fees. In other words, Myers sought attorney fees as sanctions because the Terrys did not concede defeat when responding to the admissions, or after they gave their deposition testimony. Myers overlooks the statutory context that permits the award of attorney fees, which vests considerable discretion with the trial court. We find no abuse of discretion.

During discovery, parties are sometimes asked the truth of specified matters. (Code Civ. Proc., § 2033.010.) In this case, Myers propounded 77 requests for admission, asking the Terrys to admit, among other things, that there was no consideration for the note. The Terrys denied all but five, and Myers is not seeking attorney fees in connection with requests related to the dismissal of their RICO cause of action. But, of the remaining requests, several requests for admission asked for legal conclusions on vicarious liability, alter ego liability, and agency liability. Several other requests for admission sought information about another property which was not at issue during the trial. Moreover, Myers did not prove the truth of all the denied facts at trial. Request No. 21, for example, asked the Terrys to admit that Myers did not attend the meeting at David Weule's house. The Terrys denied that admission. Myers testified that he attended the meeting.

If a party is asked to make an admission and fails to do so, and the party requesting the admission proves truth at a later trial, the party requesting the admission may ask the trial court for an order requiring the other party to pay reasonable expenses incurred in making that proof, including reasonable attorney fees. (Code Civ. Proc., § 2033.420, subd. (a).) The trial court may deny the requested order for attorney fees on

a number of grounds, such as, the party failing to make the admission has reasonable grounds to believe that it would prevail on the matter, or there is a good reason to deny the request. (*Id.*, subd. (b)(3)-(4).)

Code of Civil Procedure section 2033.420 vests the trial court with discretion to determine whether a party is entitled to reasonable expenses, including attorney fees. We review the trial court's denial of attorney fees for an abuse of discretion. (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 269.) We perceive no abuse of discretion on the trial court's part. Myers' motion sought attorney fees for prevailing at trial, and did not specify the attorney fees incurred in proving the truth of the facts improperly denied in the Terrys' responses to the requests for admission. As we have noted, many of the requests were not even properly propounded as facts, and Myers' counsel also did not present his motion seeking cost-of-proof attorney fees in a way that carried his burden to show the fees incurred to prove improperly denied admissions. Thus, the trial court reasonably exercised its discretion to deny the motion.

2. *The Trial Court Did Not Abuse its Discretion in Limiting Attorney Fees Under Civil Code Section 1717*

Myers contends the trial court abused its discretion by reducing his request for $388,190 in attorney fees as the prevailing party to $41,117 because the trial court used an inappropriate sliding scale of fault not reflected in the decision in Myers' favor. We disagree.

The trial court's apportionment was not based upon an improper sliding scale, but instead based upon a determination that the contract cause of action represented one of seven causes of action alleged by the Terrys against Myers.[12] In reaching this conclusion, the trial court necessarily determined that the Terrys' tort theories and the contract action

[12] The trial court stated: "[T]he Court awards attorneys fees in the amount of $41,117.00 which calculation represents one seventh of the amount of fees the Court finds reasonable, given the fact that the breach of contract cause of action was only one of the seven total causes of action asserted by Plaintiffs against Defendant Myers."

to enforce the note were not interrelated and did not require the presentation of identical evidence. (See *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 68-69.) We do not second guess the trial court on this discretionary ruling, and find no abuse of discretion. Thus, there was no error in the award of attorney fees.

DISPOSITION

The judgment is affirmed. The orders denying attorney fees under Code of Civil Procedure section 2033.420, and awarding attorney fees to Myers as the prevailing party pursuant to Civil Code section 1717 are affirmed. Neither party shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.